BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

RANDY SICKLER	)	
Claimant	)	
VS.	)	
	)	Docket No. 262,835
ROBERTS & DYBDAHL	)	
Respondent	)	
AND	)	
	)	
CINCINNATI INSURANCE COMPANY	)	
Insurance Carrier	)	

ORDER

Claimant appeals the January 24, 2003 Award of Administrative Law Judge Steven J. Howard. Claimant contends the Administrative Law Judge erred in finding that claimant did not put forth a good faith effort in seeking employment after his injury. The Administrative Law Judge then imputed a post-injury wage resulting in claimant being awarded a 26 percent wage loss under K.S.A. 44-510e. Claimant contends he put forth a good faith effort in seeking employment and the wage loss should be 100 percent. There is also a dispute regarding the task loss suffered by claimant as a result of the January 26, 2001 accident and whether respondent is entitled to a credit for any preexisting functional impairment under K.S.A. 44-501(c). The Appeals Board (Board) heard oral argument on July 8, 2003. Stacy Parkinson was appointed as Board Member Pro Tem for the purposes of this appeal.

APPEARANCES

Claimant appeared by his attorney, Michael W. Downing of Shawnee Mission, Kansas. Respondent and its insurance carrier appeared by their attorney, D'Ambra M. Howard of Overland Park, Kansas.

RECORD AND STIPULATIONS

The Board has considered the record and adopts the stipulations contained in the Award of the Administrative Law Judge. In addition, the parties acknowledged at oral argument before the Board that claimant had been paid 34 weeks temporary total disability compensation at the rate of $401 per week totaling $13,634. This covered the period

beginning January 27, 2001, through September 21, 2001, which the parties acknowledged is the appropriate period during which claimant would be entitled to temporary total disability compensation. No additional temporary total disability compensation is claimed. Therefore, any disputes regarding the amounts and periods of time for which claimant collected temporary total disability compensation have been resolved.

ISSUES

(1) What is the nature and extent of claimant's injury and disability? More particularly, did claimant put forth a good faith effort in seeking employment after his injury with respondent? If not, what wage should be imputed to claimant pursuant to K.S.A. 44-510e? Additionally, what, if any, task loss did claimant suffer as a result of the January 26, 2001 accident?

(2) Is respondent entitled to a credit under K.S.A. 44-501(c) for claimant's preexisting functional impairment?

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Claimant, who was employed as a truck driver for respondent, suffered accidental injury arising out of and in the course of his employment with respondent on January 26, 2001. Claimant suffered a low back injury while moving a tarp weighing approximately 125 pounds. Claimant continued driving the truck that day, reporting the injury to respondent that night. The injury suffered by claimant was in the same area where claimant had previously injured his back in 1995. After that earlier accident, claimant was treated by several doctors and chiropractors, and ultimately returned to work without restriction. Claimant then continued driving commercially for over five years, although there was a period of time when claimant worked in lighter physical activity jobs due to those earlier back problems. Claimant acknowledged he had ongoing difficulties with his back, including tingling into his legs, but he continued performing the regular duties of a truck driver for several years.

When claimant hired with respondent in July of 2000, he underwent and passed a DOT physical. However, claimant failed to advise the examining physician of his prior back problems and the fact that he had intermittent tingling into his legs. Respondent contends this information would have caused claimant to fail the DOT physical.

After claimant's January 2001 injury with respondent, he was released to return to work on September 24, 2001, at an accommodated position. Respondent's operations manager, Anthony Daugherty, testified that claimant was offered employment doing inventory and running the safety program. Mr. Daugherty testified that the job was within

claimant's restrictions. Claimant attempted the job for one day in October 2001, but testified that he had significant ongoing back pain as a result of the bending required in the job. The record, however, is void of any indication claimant complained to respondent while he was performing the job. Instead, claimant appeared at work the next day and simply terminated his employment. Respondent was not provided additional opportunity to accommodate claimant's limitations.

Claimant testified that he would have been paid $10 an hour and that he assumed he would have worked 45 hours a week. Mr. Daugherty explained in detail the fringe benefit package which would have been available to claimant had he continued in the inventory position.

Claimant attempted to obtain employment for approximately two months after leaving respondent. In December 2001, he quit looking for work and signed up for a vocational rehabilitation plan which began in April 2002 and which he was scheduled to complete in June of 2003. The vocational plan involved computer-aided drafting and lasted for approximately 60 weeks. The outcome of that program is not contained in this record.

After claimant's injury, he was referred to several doctors and other health care providers for treatment. He ultimately underwent surgery with Stephen L. Reintjes, M.D., a board certified neurological surgeon. Dr. Reintjes, after attempting physical therapy, work hardening and epidural steroids, performed a right L5-S1 hemilaminectomy and discectomy on March 26, 2001. Dr. Reintjes returned claimant to work, finding him at maximum medical improvement on September 21, 2001, which is the ending date for claimant's temporary total disability compensation. He placed restrictions on claimant of no lifting over 35 pounds, driving a car or truck up to two hours at a time, ten hours a day, with a 5- to 10-minute break every two hours, and limited claimant to occasional bending, squatting, kneeling, climbing and reaching. He assessed claimant a 15 percent impairment to the body as a whole on a functional basis for the injuries suffered to his low back, with his opinion based upon the American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment* (4th ed.). He was provided a list of tasks which had been compiled by Mary Titterington, a vocational expert hired by respondent. He ultimately determined that claimant was unable to perform five of the thirty-five tasks on the list for a task loss of 14 percent.

Claimant was referred by his attorney to P. Brent Koprivica, M.D., board certified in emergency medicine, for an evaluation. Dr. Koprivica had originally evaluated claimant on October 8, 1996, following his earlier injury, with a second evaluation on December 10, 2001, for the injury before this Board. When he first evaluated claimant in 1996, Dr. Koprivica recommended specific restrictions, limiting claimant to 50 pounds occasional lifting or carrying, and cautioned that he avoid frequent or constant bending, pushing, pulling or twisting, avoid standing in awkward positions, and should be allowed the

opportunity to change from sitting to standing or walking on an as-needed basis. He suggested claimant limit captive sitting or standing to one-hour intervals or less. Claimant testified that he was unaware of these restrictions for a period of time and ultimately, upon his return to work as a truck driver, ignored the restrictions placed upon him by Dr. Koprivica. Dr. Koprivica, in December 2001, reduced claimant's weight limitation from 50 pounds to 35 pounds (as did Dr. Reintjes in September 2001), but continued the remaining restrictions.

Dr. Koprivica assessed claimant a 10 percent impairment to the body as a whole based upon the AMA *Guides* (4th ed.) as a result of the injuries in 2001. He testified that he assessed claimant a 20 percent impairment to the body as a whole for the injuries suffered in 1995, but acknowledged that that rating was based upon the Missouri method of rating impairments, which combines both functional impairment and disability into one number. It is noted that the 1996 impairment assessed by Dr. Koprivica does not specify whether it is based upon the AMA *Guides*, whereas the opinion provided in 2001 specifies the AMA *Guides* (4th ed.).

Dr. Koprivica was provided a task list, which was created by vocational expert Michael J. Dreiling at claimant's attorney's request. Of the eleven tasks Dr. Koprivica considered, he found claimant incapable of performing eight, for a 73 percent task loss. The Administrative Law Judge, in considering both Dr. Reintjes' and Dr. Koprivica's task loss opinions, found no justification in placing greater emphasis on one over the other. The Board agrees. The Administrative Law Judge found claimant sustained a 42 percent loss of task performing abilities under K.S.A. 44-510e. However, a straight split of Dr. Reintjes' and Dr. Koprivica's task loss opinions results in a 43.5 percent task loss. The Award will be modified accordingly.

In workers' compensation litigation, it is claimant's burden to prove his entitlement to benefits by a preponderance of the credible evidence.[1]

When an injury does not fit within the schedules of K.S.A. 44-510d, permanent partial general disability is determined by utilizing the formula set forth in K.S.A. 44-510e, which provides, in part:

> The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was

[1] *See* K.S.A. 44-501 and K.S.A. 44-508(g).

> earning at the time of the injury and the average weekly wage the worker is earning after the injury.

That statute must be read in light of the policies set forth in *Foulk*[2] and *Copeland*.[3] In *Foulk*, the Kansas Court of Appeals held that a worker could not avoid the presumption against work disability as contained in K.S.A. 1988 Supp. 44-510e (the predecessor to the above quoted statute) by refusing an accommodated job that paid a comparable wage. In *Copeland*, the Kansas Court of Appeals held, for purposes of the wage-loss prong of K.S.A. 44-510e, that a worker's post-injury wage should be based upon the ability to earn wages rather than the actual earnings when the worker fails to make a good faith effort to find appropriate employment after recovering from the work-related accident.

The Kansas Court of Appeals in *Watson*[4] reiterated that the absence of a good faith effort to find appropriate employment does not automatically limit the permanent partial general disability to the functional impairment rating. Rather, the finder of fact in such circumstances is obligated to determine a post-injury wage for the permanent partial general disability formula based upon all the evidence in the record, including expert testimony concerning the worker's ability to earn wages.

In this instance, claimant was offered an accommodated job with respondent. Based upon the testimony of respondent's operations manager, it is found that claimant would have earned a substantial, but not comparable, wage, as that job would have paid less than 90 percent of the wage claimant was earning at the time of the injury. The Board finds that while the policies of *Foulk* do apply in this situation, in *Foulk*, the claimant was offered a wage which paid a comparable wage. That is not the case here. Accordingly, the policies set forth by the Kansas Court of Appeals in both *Copeland* and *Watson* more closely apply to this circumstance. Claimant's attempt to return to work with respondent was meager at best. Claimant performed the inventory job for one day, uttering no complaints to respondent and requesting no additional accommodation. The next day, claimant simply quit his employment with respondent with no explanation. The Board does not find claimant's actions in this instance to be a good faith attempt to return to or retain his employment.

Mary Titterington, respondent's vocational expert, opined claimant was capable of earning $13.21 an hour on a 40-hour week, which would equate to a wage of $528.40, which is a 29 percent wage loss. However, in the deposition of respondent's operations

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[2] *Foulk v. Colonial Terrace*, 20 Kan. App. 2d 277, 887 P.2d 140 (1994), *rev. denied* 257 Kan. 1091 (1995).

[3] *Copeland v. Johnson Group, Inc.*, 24 Kan. App. 2d 306, 944 P.2d 179 (1997).

[4] *Watson v. Johnson Controls, Inc.*, 29 Kan. App. 2d 1078, 36 P.3d 323 (2001).

manager Anthony Daugherty, specific information was provided regarding what wages claimant would have been earning had he remained employed with respondent. Claimant testified he would be making $10 per hour, and Mr. Daugherty testified there was an average of five hours per week overtime, which results in a straight time plus overtime wage of $475 per week. In addition, Mr. Daugherty testified claimant would have weekly medical insurance benefits provided by respondent in the amount of $47.20 per week, disability insurance at respondent's cost of $.80 per week, and life and accidental death insurance benefits at respondent's cost at $.92 per week. Claimant would also have earned an average weekly bonus of $27.10 per week and a profit sharing bonus of $4.27 per week. All told, this computes to a wage of $555.29 which, when compared to claimant's stipulated wage of $744.03, computes to a wage loss of 25 percent. The Board, in considering the wages which would have been available to claimant had he remained at respondent's job, imputes this wage to claimant pursuant to K.S.A. 44-510e and finds claimant's wage loss to be 25 percent.

K.S.A. 44-501(c) states, in part:

> The employee shall not be entitled to recover for the aggravation of a preexisting condition, except to the extent that the work-related injury causes increased disability. Any award of compensation shall be reduced by the amount of functional impairment determined to be preexisting.

It is clear from the record claimant suffered a substantial injury in 1995 for which he received compensation in Missouri. However, the opinions in the record, which allude to the functional impairment claimant may have had at that time, are not expressed pursuant to the AMA *Guides* (4th ed.) as mandated by K.S.A. 44-510e. In order for the functional impairment reduction to apply, the preexisting functional impairment must be determined utilizing the criteria and satisfy the requirements of K.S.A. 44-510e. In this instance, that was not done. The Administrative Law Judge in the Award reduced claimant's overall award by 20 percent based upon the opinion of Dr. Koprivica. The Board finds, however, that the opinion of Dr. Koprivica assessing claimant a 20 percent preexisting impairment does not comply with the requirements of K.S.A. 44-510e and, therefore, the percent of preexisting impairment has not been proven and a credit cannot be given.

The Board finds that in considering both claimant's wage loss of 25 percent and his task loss of 43.5 percent, claimant is entitled to a 34.25 percent permanent partial disability, with no reduction for any preexisting functional impairment.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award of Administrative Law Judge Steven J. Howard dated January 24, 2003, should be

modified to award claimant a 34.25 percent permanent partial disability to the body as a whole based upon a task loss of 43.5 percent and a wage loss of 25 percent. Claimant is awarded 34 weeks temporary total disability compensation at the rate of $401 per week totaling $13,634, followed thereafter by 135.63 weeks permanent partial disability compensation at the rate of $401 per week totaling $54,387.63, for a total award of $68,021.63.

As of July 10, 2003, claimant is entitled to 34 weeks temporary total disability compensation at the rate of $401 per week totaling $13,634, followed thereafter by 93.86 weeks permanent partial disability compensation at the rate of $401 per week totaling $37,637.86, for a total of $51,271.86, which is ordered paid in one lump sum minus any amounts previously paid. The remaining balance of $16,749.77 is to be paid for 41.77 weeks at the rate of $401 per week, until fully paid or until further order of the Director.

The Award is modified to reflect the agreement of the parties regarding the amount of temporary total disability compensation which has been paid in this matter.

In all other regards, the Award of the Administrative Law Judge is affirmed insofar as it does not contradict the findings and conclusions contained herein.

IT IS SO ORDERED.

Dated this ____ day of October 2003.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Michael W. Downing, Attorney for Claimant
D'Ambra M. Howard, Attorney for Respondent
Steven J. Howard, Administrative Law Judge
Paula S. Greathouse, Director